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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 871

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

REDWING CARRIERS, INC., AND ROCKANA CARRIERS, INC.,
Intervenors.

BRIEF OF REDWING CARRIERS, INC. AND ROCKANA CARRIERS, INC., AS INTERVENORS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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I. INTRODUCTORY STATEMENT

Redwing Carriers, Inc., and Rockana Carriers, Inc., were the respondents when this case came before the Na-

tional Labor Relations Board for hearing. By Order of the United States Court of Appeals for the District of Columbia dated July 27, 1961, Redwing Carriers, Inc., and Rockana Carriers, Inc., were granted leave to participate in these proceedings as Intervenors.

The National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*, is hereinafter referred to in this brief as the "Act".

References to the Joint Appendix are noted as "JA" and references to the Supplemental Appendix are indicated by the abbreviation "Supp. App.".

II. STATEMENT OF THE CASE

The Intervenors, Redwing Carriers, Inc., and Rockana Carriers, Inc., are motor vehicle common carriers subject to the regulation by the Interstate Commerce Commission and the Florida Railroad and Public Utilities Commission. (JA 148)

For many years Virginia-Carolina Chemical Corporation has been a continuous customer of both Intervenors (JA 149) and obviously a customer of rather substantial proportions. Virginia-Carolina Chemical Corporation was engaged in a labor dispute with its own employees with a strike developing out of this situation on about May 22, 1959. From that date until about June 2, 1959, the operations of Virginia-Carolina were curtailed with little need for the Intervenors' transportation services to and from the Virginia-Carolina premises. On about June 1, 1960, the officials of Virginia-Carolina informed the carriers that they expected to resume operations the next day and would need regular transportation service. (JA 173) Pursuant to their legal obligations to provide transportation the In-

tervenors undertook to provide the required services. At this time there had been but a few isolated incidents of violence or threats of violence in connection with the dispute at Virginia-Carolina.

On June 2, 1959, the Intervenors dispatched a number of drivers to the premises of Virginia-Carolina for the purpose of picking up freight. Eight drivers refused to carry out this assignment. The evidence seems clear that the drivers refusing to perform work assigned to them did so for reasons other than fear of bodily harm. A vast majority of the Intervenors' drivers, however, carried out their assignments and continued to do so throughout the duration of the Virginia-Carolina labor dispute.

The drivers who refused to carry out their assignments were terminated from their employment by the Intervenors. A charge was filed and a complaint issued alleging that the Intervenors had violated Section 8(a)(1) of the Act by terminating these employees. The Trial Examiner concluded that Section 502 of the Act gave these drivers the right to refuse to perform these particular assignments and therefore their termination constituted a violation of Section 8(a)(1).

In its initial Decision and Order of March 6, 1961,[1] the National Labor Relations Board reversed the findings of the Trial Examiner concluding that it had not been shown that "abnormally dangerous conditions for work" existed as provided in Section 502 of the Act and further that the refusal of the drivers to perform a part of their work constituted insubordination which is not protected by the Act. In this decision the Board did not reach the question whether Section 502 does grant positive rights which can

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1. 130 NLRB 1208.

be made the subject matter of unfair labor practices under Section 8(a)(1) of the Act.

Contrary to the initial holding, in its Supplemental Decision and Order of July 20, 1962,[2] the Board found that the involved employees had engaged in protected concerted activity in refusing to cross the Virginia-Carolina picket line. The Board unanimously reached the same result, however, as in the initial holding by concluding that the Intervenors' act in replacing or terminating the drivers was entirely for the purpose of continuing business operations. In so finding the Board properly pointed out that the Intervenors immediately secured replacements for the drivers in question and also that there was no evidence of anti-union animus by the Intervenors. The Board in its supplemental holding also points out that the termination appeared to be not in reprisal for the drivers' refusal but to enable the Intervenors to continue their business dealings with Virginia-Carolina.

In affirming the findings of the National Labor Relations Board the United States Court of Appeals for the District of Columbia concluded that, from the record as a whole, adequate support for the Board's conclusions was clearly shown. The Court cited *N.L.R.B. v. Rockaway News Supply Co.*, 197 F.2d 111 (C.A.2, 1952), *aff'd. on other grounds*, 345 U.S. 71 (1953), as supporting authority.

III. QUESTION PRESENTED

The ultimate question of course is whether the Court of Appeals properly affirmed the Board's holding that an employer does not violate Section 8(a)(1) of the Act by discharging employees for refusing to accept assignments

2. 137 NLRB 1545.

requiring them to cross a picket line at the premises of another employer. In conclusion of this question, however, several important and directly related principles require careful consideration. These principles may be briefly stated as follows:

(A) Rights established by Section 7 of the Act must be balanced against an employer's corresponding right to operate his business.

(B) The discharge of employees engaging in such concerted activities as found in this case must be for the purpose of discouraging these activities to be in violation of Section 8(a)(1) of the Act.

IV. PRELIMINARY STATEMENT

The surprising contentions of the Petitioner may be briefly summarized in these words: The established rights of a private business to take such noncoercive action as may be necessary to insure its economic welfare must be completely and totally disregarded where the Labor Management Relations Act of 1947 is concerned.

The principle underlying this proposition, in its various forms, has been placed in issue an untold number of times over the years. Probably the first point of contact was where established private rights to operate one's own business, unrestrained, came into conflict with the first law devised to regulate some aspect of the free enterprise system. Admittedly the Labor Management Relations Act of 1947 was directed to the encouragement of collective bargaining. This does not mean, however, that those provisions of the law attendant to such purposes are so absolute as to slay the prime source of any unions' existence, *i.e.*, private enterprise.

V. ARGUMENT

A. Rights Established by Section 7 of the Act Must Be Balanced Against an Employer's Corresponding Right to Operate His Business.

The Act undeniably prohibits reprisal against employees who exercise rights guaranteed in Section 7. This is not to say, however, that the guarantee of such rights must be mechanically applied or that such rights are immutable and must not on occasion give way to conflicting rights. This Court in a recent utterance commented in a closely related context that mechanical answers will not avail for the solution of nonmechanical complex problems in labor-management relations. See *NLRB* v. *United Steelworkers of America and Nutone*, 357 U.S. 357, 364. And as the Board correctly reasoned in its decision a balance must be struck if conflicting rights stand opposed.

In its considerations as to the validity of an employer's "no solicitation rule" the Court in *Republic Aviation Corp.* v. *NLRB*, 324 U.S. at 797-798, summarized the perspective in which conflicting employer-employee rights must be viewed in these words:

> "These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self organization assured to the employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society."

Employee rights are subject not only to the specific limitations imposed by Section 8 of the Act but these rights are also subject to other limitations. In regard to the right to strike the Court stated in *NLRB* v. *Fansteel Metallurgical Corporation*, 306 U.S. 240, 256:

> "Section 13 provides that nothing in the Act, 29 USCA Section 163, 'shall be construed so as to interfere with or impede or diminish in any way the right to strike'. But this recognition of 'the right to strike' plainly contemplates a lawful strike,—the exercise of the unquestioned right to quit work."

And neither did the Act make legal a strike that ran afoul of Federal law, *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31; nor one in violation of a contract made pursuant thereto, *NLRB* v. *Sands Manufacturing Co.*, 306 U.S. 332, nor one creating a national emergency, *United States* v. *United Mine Workers*, 330 U.S. 258.

The Courts and the Board have consistently held that Section 7 of the Act does not grant unlimited rights to employees. In *NLRB* v. *Draper Corporation*, 145 F.2d 199, 202 (C.A. 4, 1944), the Court said:

> "The purpose of the Act was not to guarantee to employees the right to do as they please but to guarantee to them the right to collective bargaining for the purpose of preserving industrial peace."

See also *Joanna Cotton Mills* v. *NLRB*, 176 F.2d 749 (C.A. 4, 1949); *NLRB* v. *Illinois Bell Telephone Co.*, 189 F.2d 124 (C.A. 7, 1951); *Southern Steamship Co.* v. *NLRB*, *supra*; *NLRB* v. *Reynolds International Pen Co.*, 162 F.2d 680, 683 (C.A. 7, 1947).

In the case of *NLRB* v. *Montgomery Ward*, 157 F.2d 486 (C.A. 8, 1946), the Circuit Court concluded:

> "While these employees had the undoubted right to strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work."

And even in early National Labor Relations Board decisions it was recognized that there were limitations upon the rights guaranteed to employees by Congress. In the matter of *Peyton Packing Co., Inc.*, 49 NLRB 828, 843, the Board pointed out the following:

> "The Act of course does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose."

In a later Board case in the matter of *Robert H. Snow, d/b/a Auto Parts Company*, 107 NLRB 242 (1953), involving a truck driver employee's refusal to cross picket lines at the place of business of other employers, the Board stated:

> "However viewed and simply stated, Shuman's (a driver) conduct was a refusal to do the job for which he had been hired and a direct disregard of his employer's instructions. For such conduct he could properly be discharged."

In *Rockaway News Supply Co., supra*, the Second Circuit outlined the correct solution to the issue here before the Court in these revealing words:

> ". . . an employee is of course free to refuse to cross a picket line when he is on his own time and his discharge for so doing would doubtless be a violation of Section 8(a)(1). But he is not free to exercise the right during his working time in violation of his employer's working rules by refusing to perform that part of his regular duties which requires him to cross the picket line. To hold otherwise would be to permit an employee to unilaterally dictate the terms of his employment which is well settled he may not do."

And as here where the Intervenors' actions were motivated only by a desire to continue efficient operations and its duty to fulfill its legal and economic obligations to its customers, a mechanical application of Section 7 would neither be in the public interest nor be supported by the holdings of the Board and the courts.

B. The Discharge of Employees Engaging in Concerted Activities As Found in This Case Must Be for the Purpose of Discouraging Such Activities to Be in Violation of Section 8(a)(1) of the Act.

Perhaps the most striking aspect of this case is the complete absence of anti-union animus, or any evidence for that matter that the Intervenors acted for illegal purposes. The holding upon which the appellants appear to have grounded its contentions, *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, very clearly indicates that decision was based upon the fact the employees discharged therein were disciplined because they engaged in a concerted walkout rather then the employer's desire to continue business operations, a situation completely dissimilar to the matter here before the court. The employees involved in Washington Aluminum walked out because of the intense cold at the plant in which they were employed.

The facts are quite clear that the actions of the management were taken in retribution for the walkout and not for the purpose of continuing its operations. And neither was *Washington Aluminum* management faced with the peculiar legal obligations of a common carrier. In fact, a manufacturing enterprise such as the Washington Aluminum Company may close down its operations whenever necessary, whereas pursuant to both State and Federal regulations, a common carrier must continue to offer its services to the public regardless of the difficulties encountered.

The Petitioner further contends that Section 7 rights are absolute except in a few explicit, well defined areas and urges that *NLRB* v. *Washington Aluminum, supra,* so holds. The language of the decision fails to support such views. In *Washington Aluminum,* the court makes this comment:

> "It is of course true that Section 7 does not protect all concerted activities, but that aspect of the section is not involved in this case. The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent, or in breach of contract. . ."

It is obvious from the court's language that it was not intended as an attempt to make an all inclusive delineation of the types of Section 7 concerted activities which cannot be protected under the Act. The Court indicated only that the concerted activities in that particular case were not such as would fall within what the court considered "normal" categories of unprotected activities. An obvious exception to the Petitioner's proposition that Section 7 rights are "almost absolute" is found in the court-tested right of employers to restrict organizational solicitation on

company property where such rules are made in the interest of production, order and discipline.[3]

The Petitioner further appears to contend support in the Board's recent decision in the matter of *L. G. Everist, Inc.*, 142 NLRB 20 (1963) and in the Circuit Court's holding in *NLRB* v. *Cone Brothers Contracting Company*, 317 F.2d 3 (C.A. 5, 1963). Neither case may be termed persuasive authority relative to the issues here under consideration.

The Board's decision in *L. G. Everist, Inc.*, was based upon the employer's failure to reinstate employees who engaged in what was held to be "protected concerted activities" rather than a "discharge" to continue business operations. The Board made no ruling upon the merits of the "discharge" but nevertheless did indicate that its ruling there under review would be controlling. At any rate the Board's ruling in *L. G. Everist* has absolutely no application here. The legal principles to be applied to a refusal to reinstate "striking" employees upon timely applications obviously are completely dissimilar to those appropriate in this case. Significantly lacking in *L. G. Everist* are conflicting employer and employee rights, but even more significantly there is found in *Everist* a background of anti-union activity occurring both prior and subsequent to the employer's refusal to reinstate.

Even a casual reading of the Circuit Court's decision in *NLRB* v. *Cone Brothers Contracting Co., supra*, fails to offer support to the Petitioner's assertions. The Court found ample evidence in that case of anti-union bias and illegal purpose, stating as follows:

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3. *NLRB* v. *United Steelworkers of America and Nutone, supra.*

> ". . . here there is ample evidence of the respondent's strong anti-union bias and prejudice, and there is also ample evidence to indicate that the drivers involved were selected because of the respondent's belief that as union adherents they would show the union man's well-known respect for and deep seated reluctance to cross picket lines, and refuse to do so, thereby giving an excuse to discharge them . . ."

In its holding, however, the Court, without qualification, indicated that where circumstances similar to those to which the Intervenors were confronted are involved, that a contrary holding would be appropriate. The Court stated thusly:

> ". . . *While we recognize the respondent's right to attempt to run its business in spite of the sympathetic activities of the drivers,* we find no evidence in this case that such was the fact, that is, that the respondent in so doing what it did acted only to preserve the efficient operation of its business." (Emphasis added).

And the court's reasoning in *Cone Brothers* offers further support to the Intervenors' views in stating that:

> "In short, we think that when it appears that a discharge of an employee *for refusing to cross a picket line* is resorted to *out of anti-union animus* to get rid of a union sympathizer *and not to preserve the efficient operation of an employer's business,* an unfair labor practice in violation of 8(a) (1) and (3) occurs." (Emphasis added).

At various points in the record it has been contended by the union that the Intervenors might merely have transferred to other work the drivers who refused their assignments and were discharged.

The administrative difficulties involved in arbitrarily shuffling personnel and the engendering of employee dissatisfaction over loss of one's choice route assignment to

a junior employee would have further complicated the company's attempts to follow sound management practices. But what the Intervenors might have done is not material, for, whatever the Intervenors chose to do, it was undertaken only in the interest of good management and sound economics.

VI. CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

WILSON, BRANCH, BARWICK AND VANDIVER

By: .....
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CERTIFICATE OF SERVICE

This is to certify that I have this day served copies of the foregoing Brief of the Intervenors, Redwing Carriers, Inc., and Rockana Carriers, Inc., upon the following, by depositing same in the United States Mail, properly addressed and with the correct amount of postage affixed thereto:

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This the ..... day of March, 1964.

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